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In the

Supreme Court of the United States

October Term, 1970

No. 830

MAYLAND L. CLARK, *Petitioner*

vs.

ALBERT GULESIAN, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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October 30, 1970

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is now reported at 429 F.2d 405 (1970). No formal opinion was rendered by the District Court for the District of Maine, but on Defendant's motion, treated as a motion for summary judgment, District Judge Gignoux stated: "Hearing had Motion granted and action dismissed *Tantish v. Szendy*, 158 Me. 228 (1962); *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1958)".

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the statute of limitations as applied to malpractice actions in the State of Maine is an unconstitutional denial of due process and the equal protection of the law, where the injured party is unaware and cannot reasonably be expected to be aware of the injuries prior to the expiration of two years? (This is the exact language of Petitioner in his appeal to the Court of Appeals for the First Circuit.)

STATUTORY PROVISIONS INVOLVED

These are set forth in the Petition.

STATEMENT OF THE CASE

Most of the statements contained in the first four paragraphs of Petitioner's Statement of the Case are not contained in the pleadings. The basic facts are that on August 4, 1952, Respondent osteopathic physician operated on Petitioner (who had been born February 5, 1942) to repair a puncture wound in the abdominal area. Respondent at that time allegedly left a towel within the abdomen of Petitioner. Petitioner allegedly did not know and through the exercise of reasonable care could not have known about the presence of the towel until it was discovered on May 8, 1969 during general exploratory surgery. Respondent hasn't seen or treated Petitioner for anything since 1957.

ARGUMENT

Petitioner does not cite one shred of authority in support of the "novel contention" he is making here. He seeks to have this Court here establish a novel principle of law in spite of the total absence of lower court or state court or other authority or holdings in his favor. As Chief Judge Aldrich said in the decision below:

> "Plaintiff's first argument on this appeal is that the Maine statute, as interpreted and applied in *Tantish*, is unconstitutional as a denial of equal protection and due process. For this novel contention he cites no direct authority of any sort. While state courts dis-

agree in their approach as to when, under circumstances such as these, the cause of action accrues, defendant points out that no majority opinion has based its decision on constitutional grounds." (Underlining added)

There have been many cases, especially in recent years, considering the question of when a medical malpractice statute of limitations commences to run; many were foreign object cases. They arrived at a variety of results on a variety of theories. Some states, such as Maine, Massachusetts, Wisconsin, New Mexico, Missouri, New Hampshire and Virginia within the last ten years—and others previously—applied the "time of the act" rule. Others, perhaps the majority recently, applied the "discovery" rule. Still others adopted various exceptions to the "time of the act" rule. While the courts construe their malpractice statutes in various ways, on one thing they are uniform and unanimous—we do not find a single leading case in a single American jurisdiction decided on constitutional grounds or, in fact, finding or even hinting at a constitutional problem. (So as not to unduly prolong this Brief we have collected these cases in the Appendix hereto.)

The courts unanimously recognize this "is a policy decision" (Chief Judge Aldrich in opinion below) and a question of statutory interpretation—not a constitutional question. Some courts specifically reject the constitutional argument.

> "We do not doubt that the legislature possesses the constitutional power to strike the balance one way or the other and by establishing a clear line of demarcation to fix a time certain beyond which no remedy will be available". *Ruth v. Dight*, 453 P.2d 631 (Wash. 1969)

See also, e.g., *DeLong v. Campbell*, 157 Ohio St. 22, 104 N.E. 2d 177 (1952); *Reistad v. Manz*, 11 Wis. 2d 155, 105 N.W. 2d 324 (1960). Other courts—and this would seem in some degree to include almost all—while not specifically mentioning any constitutional arguments, make it clear this is simply a question of statutory interpretation, that the legislature has the constitutional power to make the determination, and that when the statute is clear the courts have no room for interpretation. The question for interpretation where there is

ambiguity is when did the action "accrue" or the statute "begin to run". See, e.g., *Yoshizaki v. Hilo Hospital*, 433 P.2d 220 (Hawaii 1967), *Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 248 N.E. 2d 871 (1969), *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961)

It is difficult to believe that all the courts in all the cases, including those adopting the "discovery" rule, either rejected, missed or ignored a meritorious constitutional point. It is difficult to believe they would continually say it is up to the legislature, without indicating a limit, if there is a valid constitutional objection.

The Supreme Judicial Court of Maine in a recent case, after very carefully considering the arguments and policy considerations on both sides, rejected the "time of discovery" argument. *Tantish v. Szendey*, 158 Me. 228, 182 A.2d 660 (1962). This result had been forecast by the First Circuit. *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959).

The only malpractice case Petitioner cites indicating there might be a constitutional problem is *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). It is certainly of significance that the opinion quoted is that of a concurring Justice, not of the Court itself, since the majority opinion didn't raise the point. Furthermore, it is the Pennsylvania Constitution that is referred to, not the United States Constitution. Finally and most significantly, we find that in the medical malpractice limitations field, *Ayers* is one of the most cited cases—but never once, so far as we have found, has a majority opinion cited it on a constitutional issue, never once has a court's opinion cited the McBride concurrance or given it any credence whatsoever. It is stated in 80 *A.L.R.* 2d 368, 387 that "no case supporting this view has been found . . . ."

It does not seem to us that *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282 (1949), where recovery was sought under the Federal Employers' Liability Act, furnishes any support for Petitioner; *Urie* involved statutory construction and not constitutional issues. This Court was there interpreting that Act to determine "the day the cause of action accrued", just as the many state courts have interpreted state statutes; there is no implication Congress could not have constitution-

ally provided a different time of accrual. In the second place, unlike a foreign object case, the Plaintiff there had a disease that had arisen from "continuous inhalation of silica dust" over the years and it was apparently impossible to tell just when the act or acts causing the disease had occurred—possibly they had actually been within the three years. We do not contend that on facts analogous to *Urie* (that is, continuous treatment and continuous acts up to a time within the limitations period, together with the impossibility of determining which acts caused the harm), the Supreme Judicial Court of Maine might not agree with *Urie;* suffice it to say a foreign object case is not that type of case.

In *Wilcox v. Plummer*, 29 U.S. (4 Peters) 172, 7 L. Ed. 821 (1830) (involving malpractice of an attorney), this Court cites as authority a case where "the plea of the statute was sustained though the proof established that it was unknown to the plaintiff until the time had run out".

Finally, it seems Petitioner may miss—or at least avoid—the point here. He says at pages 6 - 7 of his Petition that "it is arbitrary and unreasonable to maintain that the need for repose would be violated unless the period of limitations runs from the date of the negligent act . . . ." Of course, we don't maintain that at all. What we maintain is that it is up to the legislature to determine when the period starts to run and that it is not unconstitutional to determine that it starts at the time of the negligent act.

1. THE DECISION BELOW IS CLEARLY CORRECT

As an indication of how clear the First Circuit thought this matter, they chose this case as an occasion to "inaugurate" their new practice of dispensing with oral argument where they found "the issues to be manifestly simple and clear . . . ."

Going outside the malpractice field, Petitioner hasn't cited a single case dealing with a single statute of limitations in any field holding that the statute violated the due process or equal protection provisions of the United States Constitution.

There is no question an application of a limitations statute can be hard on an innocent plaintiff. But statutes of limitation are almost always hard—they are intended to be. They are intended to cut off meritorious claims as well as other ones. They are based on a long-established, firmly-rooted public policy. Justice Jackson stated in *Chase Securities Corp v. Donaldson*, 325 U.S. 304, 314, 89 L.Ed. 1628, 1635 (1945):

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost . . . . They are by definition arbitrary and their operation does not discriminate between the just and unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. (Underlining added)

A basic difficulty with Petitioner's argument is that he is classifying limitations acts solely from the point of view of plaintiffs and also considering only their requirement of some degree of diligence. He ignores the fact that in determining classifications the defendant must also be considered, as must the interest of the general public; otherwise, there is little reason for limitations acts. The legislature should be and always has been allowed wide discretion in determining where to draw the lines in limitation acts.

In *Kavanagh v. Noble*, 332 U.S. 535, 68 S.Ct. 235, 92 L.Ed. 150 (1947), with reference to a limitations period in the Internal Revenue Code, this Court said:

> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary . . . . Remedies for resulting inequities are to be provided by Congress, not the courts."

The State of Maine is certainly very concerned with the standard of health care within its borders, since that helps determine the health of its citizens. It would seem to be well within its power to take reasonable steps to assure its high standards. Without a healthy medical community we are unlikely to have a healthy community. If this statute will—or even may—reasonably further such a basic concern, there would seem to be no question of its constitutionality. In determining classifications and where to draw the lines in this area of great public interest the legislature should be allowed especially wide discretion.

Petitioner contends that here Maine has refused a remedy or provided "an illusory one at best". It is interesting to note other instances where this Court and other courts have allowed a remedy to be totally abolished.

We are delighted to see that Petitioner apparently considers the alienation of affections and breach of promise to marry cases relevant (see *Hick* and *Daily* cases on page 6 of Petition), since they seem very analogous to us and since the overwhelming majority of the jurisdictions hold their abolition constitutional. After citing cases upholding such statutes in at least six states, the Court in *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967), says: "Apparently Illinois is the only state which has declared such an act unconstitutional."

The New York court, in perhaps the leading case on the constitutionality of such statutes, concerning breach of promise, said:

> "The legislature, however, in dealing with the subject must have in mind the general welfare. It must determine what is for the best interest of the people of the state as a whole . . . .
>
> ". . . Not all causes of action and rights which existed at common law are beyond legislative control".

Fearon v. Treanor, 272 N.Y. 268, 5 N.E. 2d 815 (1936), reh. den. 273 N.Y. 528, 7 N.E. 2d 677 (1937), remittitur amended (To allegation the statute violated the Fourteenth Amendment "because the right to damages for breach of contract to marry constitutes a property, or common-law, right",

the Court "held that the law aforesaid is not repugnant to the Constitution of the United States.") 273 N.Y. 645, 8 N.E. 2d 36 (1937), app. dism'd ("The appeal herein is dismissed for the want of a substantial federal question.") 301 U.S. 667, 81 L.Ed. 1332, 57 S.Ct. 933 (1937), reh. den. 302 U.S. 774, 82 L. Ed. 600, 58 S. Ct. 6 (1937). New York also held the statute constitutional as applied to actions for alienation of affections and criminal conversation. *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E. 2d 47 (1937), remittitur amended (to include "This court held that such laws are not repugnant to, or violative of, the Fourteenth Amendment to the Constitution of the United States".) 274 N.Y. 570, 10 N.E. 2d 556 (1937), appeal dismissed 302 U.S. 641, 58 S. Ct. 57, 82 L. Ed. 398 (1937).

But this is not the only situation where the United States Supreme Court has upheld abolition of a remedy. This Court in *Fearon* and in *Hanfgarn* each time in dismissing for want of a substantial federal question cited three cases. *Second Employers' Liability Cases*, 223 U.S. 1, 50, 32 S. Ct. 169, 56 L. Ed. 327 (1912) sustained a basic change of remedy against constitutional attack. *New York Central R. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917) upheld the constitutionality of the New York Workmen's Compensation Act, which, of course, drastically affected common law rights and remedies. Perhaps the most interesting case here is *Silver v. Silver*, 280 U.S. 117, 50 S. Ct 57, 74 L. Ed. 221 (1929), upholding a Connecticut statute prohibiting guest passenger actions. Here Justice Stone said:

> "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."

In *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931) (guest passenger case), relying on *Silver*, the Court said "a right of action for a tort to happen in the future is not property, and may be abrogated by the Legislature".

This oft-quoted passage from *Silver* has been quoted within the last year by the Court of Appeals for the Fourth

Circuit in holding under the Federal Drivers Act that "the right to sue a co-worker does not enjoy constitutional protection." *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970).

From the line of cases following *Silver*, it would appear doubtful that the classification here penalizes the exercise of any "constitutional right". Thus, the classification need not be "shown to be necessary to promote a *compelling* governmental interest." *Sapiro v. Thompson*, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). But even if there was a "constitutional right" to sue the doctor, the classification here would appear appropriate to the state's compelling interest in the health of its citizens.

Isn't the State as concerned with the area of health and doesn't it have as permissible objectives as in those fields? Can't the State limit the remedy in the time-honored manner here when they could abolish it there?

Chief Justice Warren said in *McGowan v. Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393, 399 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957), this Court pointed out that "One who assails the classification . . . must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary."

We fail completely to see why the classification made by Maine here is not reasonable. In any event, it would seem

clear this is not the "invidious discrimination" that the Equal Protecton Clause protects against. Petitioner here actually seeks not equal treatment or reasonable treatment but preferred treatment. He who because of his minority had 12 1/2 years (until 2 years after he became 21) in which to bring suit claims that was not enough. The Legislature had the interests of everyone, not just Petitioner, to look after. The question is not how we would classify if we were legislators, but rather whether there is any reasonable basis for their classification. It is not unlikely that wherever lines are drawn and classifications made, someone will suffer. It seems to us that the Maine statute as interpreted by the Supreme Judicial Court of Maine, is well within constitutional authority.

Most of the due process cases Petitioner cites are criminal cases on procedural matters that deal with the question of whether the Fourteenth Amendment incorporates various provisions of the Bill of Rights against actions by the states. None indicates that states have to provide any particular civil remedy. (In fact, it is doubtful if they even say the Fourteenth Amendment requires the states to furnish a civil remedy at all in a matter of this sort.) In any event, it would not seem to be "basic to our free society" that one person be allowed to bring and another person forced to defend an action seventeen years after the act from which it arose occurred.

2. THERE IS NO CONFLICT OF DECISION

As already indicated, there is no conflict of authority whatsoever on the constitutional question. The cases directly in point are unanimously in acccord with the decision of the Court of Appeals here. None of the other cases on related subjects establishes the principle Petitioner urges. Petitioner is here asking this Court at this time to establish a wholly new principle.

3. FEW PEOPLE ARE DIRECTLY AFFECTED BY THE ISSUE PRESENTED BY THE INSTANT CASE

Obviously, this case directly affects only people in the states that have not adopted the "discovery" rule either by

court decision or by statute. Petitioner points out at page 4 that only 16 states still adhere to the "time of the negligent act" rule and "that in many of those states the rule (has) been engrafted with many exceptions . . . ." Presumably, in these states the number of people who with good reason fail to bring suit within the statutory period is quite small. Furthermore, bills have been introduced in some of these states (such as Maine and Massachusetts) to have the legislature enact the "discovery" rule; presumably in the future some will do so. Thus, the number of people who would be directly affected by this is probably very, very small.

4. PETITIONER IS ATTACKING THE VERY FOUNDATIONS OF LIMITATIONS ACTS

So far as we can see, the constitutional door has not been opened to give a person extra time to bring suit because of lack of knowledge but absent fraud or willful concealment. To create a constitutional exception for lack of knowledge would be to inject a wholly new, potentially almost limitless, concept into the limitations field. We are not here dealing with statutory construction as limitations cases normally do.

Unless one were sure a potential claimant was mentally competent, knew he had been injured, knew just how he had been injured and the extent of the injuries and knew the person to sue and the time for doing so, could one ever again rely on a limitations act?

But there is no reason to confine this to personal injury or malpractice actions. What about notice statutes against municipalities or estates of decedents? What about minors? What about adverse possession actions? Is it likely one is going to sit idly by and watch any limitations act run? Isn't he always going to contend lack of knowledge of some sort?

It seems to us that if Petitioner established the constitutional exception for lack of knowledge, a new exception would be forced on all courts for all statutes of limitation or notice cases in all fields. Petitioner here isn't asking this Court just to interpret a statute in a manner to benefit him; he is asking that the Court strike a blow at the heart of limitations

acts, that this Court introduce not a rule of construction or an interpretation but a constitutional doctrine that might revolutionize the limitations field—and, we would allege, quite possibly emasculate it. Yet, he seeks to have this Court now create this revolutionary doctrine in the total absence of any direct authority he can cite. Certainly Petitioner demonstrates no reason or necessity for this Court to now establish such a principle here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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October 30, 1970

APPENDIX

The following appear to us to be the leading cases from all the jurisdictions that have spoken considering medical malpractice statutes of limitation and the question of discovery; we cannot find even an inference of a constitutional problem in any majority opinion:

Acton v. Morrison, 62 Ariz. 139, 155 P. 2d 782 (1945) (dentist); *Crossett Health Center v. Croswell*, 221 Ark. 874, 256 S.W. 2d 548 (1953); *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936); *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957); *Layton v. Allen*, 246 A.2d 794 (Del. 1968); *Burke v. Washington Hospital Center*, 293 F. Supp. 1328 (D.D.C. 1968); *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954); *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365 (1934); *Saffold v. Scarborough*, 91 Ga. App. 628, 86 S.E. 2d 649 (1955); *Yoshizaki v. Hilo Hospital*, 433 P.2d 220 (Hawaii 1967); *Billings v. Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P.2d 224 (1964); *Owens v. White*, 380 F.2d 310 (9th Cir. 1967) (applying Idaho law); *Mosby v. Michael Reese Hospital*, 49 Ill. App. 2d 336, 199 N.E. 2d 633 (1964) (Illinois rule later modified by statute); *Guy v. Schuldt*, 236 Ind. 101, 138 N.E. 2d 891 (1956); *Ostojic v. Brueckmann*, 405 F.2d 302 (7th Cir. 1968) (applying Indiana law); *Ogg v. Robb*, 181 Iowa 145, 162 N.W. 217 (1917); *Waddell v. Woods*, 160 Kan. 481, 163 P.2d 348 (1945); *Hill v. Hays*, 193 Kan. 453, 395 P.2d 298 (1964); *Carter v. Harlan Hospital Ass'n* 265 Ky 452, 97 S.W. 2d 9 (1936); *Perrin v. Rodriguez*, 153 So. 555 (La. App. 1934) (dentist); *Springer v. Aetna Cas. & Sur. Co.*, 169 So. 2d 171 (La. 1964); *Tantish v. Szendey*, 158 Me. 228, 182 A. 2d 660 (1962); *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959) (applying Maine law); *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966); *Capucci v. Barone*, 266 Mass. 578, 165 N.E. 653 (1919); *Pasquale v. Chandler*, 350 Mass. 450, 215 N.E. 2d 319 (1966); *Johnson v. Caldwell*, 371 Mich. 368, 123 N.W. 2d 785 (1963); *Schmitt v. Esser*, 178 Minn. 82, 226 N.W. 196 (1929); *Wilder v. St. Joseph Hospital*, 225 Miss. 42, 82 So.2d 651 (1955); *Laughlin v. Forgrave*, 432 S.W. 2d 308 (Mo. 1968); *Johnson v. St. Patrick's Hospital*, 148 Mont. 125, 417 P.2d 469 (1966); *Spath v. Morrow*, 174

Neb. 38, 115 N.W.2d 581 (1962); *Cloutier v. Kasheta*, 105 N.H. 262, 197 A.2d 627 (1964); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961); *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963); *Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 248 N.E. 2d 871 (1969); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *Iverson v. Lancaster*, 158 N.W.2d 507 (N.D. 1968); *Delong v. Campbell*, 157 Ohio St. 22, 104 N.E. 2d 177 (1952); *Seitz v. Jones*, 370 P.2d 300 (Okla. 1962); *Berry v. Branner*, 245 Ore. 307, 421 P.2d 996 (1966); *Ayers v. Morgan*, 397 Pa. 282, 154 A. 2d 788 (1959); *Wilkinson v. Harrington*, 243 A.2d 745 (R.I. 1968); *Hinkle v. Hargens*, 76 S.D. 520, 81 N.W. 2d 888 (1957); *Bodne v. Austin*, 156 Tenn. 366, 2 S.W. 2d 104 (1928) (Dentist); *Gaddis v. Smith*, 417 S.W. 2d 577 (Texas 1967); *Christiansen v. Rees*, 20 Utah 2d 199, 436 P.2d 435 (1968); *Murray v. Allen*, 103 Vt. 373, 154 A. 678 (1931); *Hawks v. DeHart*, 206 Va. 810, 146 S.E. 2d 187 (1966); *Morgan v. Schlanger*, 374 F. 2d 235 (4th Cir. 1967) (Virginia law); *Ruth v. Dight*, 453 P.2d 631 (Wash. 1969); *Morgan v. Grace Hospital*, 149 W.Va. 783, 144 S.E. 2d 156 (1965); *Reistad v. Manz*, 11 Wis. 2d 155, 105 N.W.2d 324 (1960).